IN THE HIGH COURT OF JUDICATURE AT PATNA

MA No.297 of 2003

Ajay Kumar Khaitan @ Ajay Khaitan, S/o.- Late Nath Mal Khaitan, Khaitan Associates Gangotri Apartment, Flat No. 102, Exhibition Road, Patna, at present resident of Pushpa Vihar, Ist Floor, 1 B, Exhibition Road, P.S.- Gandhi Maidan, Distt/Town-Patna.

…….Appellant

Versus

1. Smt. Kusum Devi, W/o.- Late Gopal Thakur, 2. Sunil Thakur, 3. Bir Bahadur Thakur, Respondent Nos. 1 to 3 are resident of village-Bhatahan, P.S.-Sugauli, Distt.- East Champaran, 4. M/s. Manav Distributor, Marwari Awash Grih, Fraser Road, Patna-1. 5. Driver Kishore Singh, S/o.- Harihar Singh, Vill.- Umdha, P.S.- Muffashil Chapra, Distt.- Saran(Chapra), The Divisional Manager, Oriental Fire & General Insurance Company Ltd., Motihari.

…….Respondents

WITH

MA No.298 of 2003

Ajay Kumar Khaitan @ Ajay Khaitan, S/o.- Late Nath Mal Khaitan, Khaitan Associates Gangotri Apartment, Flat No. 102, Exhibition Road, Patna, at present resident of Pushpa Vihar, Ist Floor, 1 B, Exhibition Road, P.S.- Gandhi Maidan, Distt/Town-Patna

…….Appellant

Versus

1. Smt. Bidya Devi, W/o- Late Om Prakash Thakur, 2. Sunita Kumari, 3. Jagarnath Thakur, Respondent Nos. 1 to 3 are resident of Village- Kaithwalia, P.S.- Sugauli, Distt.- East Champaran, 4. M/s. Manav Distributor, Marwari Awash Grih, Fraser Road, Patna-1, 5. Driver Kishore Singh, S/o- Harihar Singh, Village-Umdha, P.S.-Muffashil Chapra, Distt.-Saran(Chapra), 6. The Divisional Manager, Oriental Fire & General Insurance Company Ltd., Motihari.

……..Respondents

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WITH

MA No.299 of 2003

Ajay Kumar Khaitan @ Ajay Khaitan, S/o.- Late Nath Mal Khaitan, Proprietor Khaitan Associates, Gangotri Apartment, Flat No. 102, Exhibition Road, Patna, at present resident of Pushpa Vihar, Ist Floor, 1 B, Exhibition Road, P.S.- Gandhi Maidan, Distt/Town-Patna

…….Appellant

Versus

1. Smt. Tara Devi, W/o.- Late Uma Kant Thakur, 2. Jai Prakash, S/o- Late Uma Kant Thakur, 3. Sunil, S/o- Late Uma Kant Thakur, 4. Chandan, S/o.- Late Uma Kant Thakur, 5. Gunja Kumari, D/o- Late Uma Kant Thakur, respondent no. 1 to 5 are resident of village- Bhatkarja, P.S.- Sangrampur, Distt.- East Champaran, 6. M/s. Manav Distributor, Marwari Awash Grih, Fraser Road, Patna-1, 7. Driver Kishore Singh, S/o.- Harihar Singh, Village-Umdha, P.S.- Muffashil Chapra, Distt.-Saran(Chapra), 8. The Divisional Manager, Oriental Fire & General Insurance Company Ltd. Motihari

…… Respondents

13/ 30.09.2008

This Misc. Appeal has been filed by the appellant Ajay Kumar Khaitan @ Ajay Khaitan for setting aside the judgment dated 10th April, 2003 and award signed on 01.08.2003 by Sri Mohammad Shamim, 3rd Additional District Judge-Cum-Motor Accident Claims Tribunal, Motihari, East Champaran (hereinafter called 'Tribunal') in Claim Case No. 17 of 1994, filed by Smt. Kusum Devi, respondednt no. 1 and others, whereby and whereunder, the learned Tribunal has fastened the liability on the appellant/owner of the vehicle, bearing registration No. BEA – 6025.

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After considering the fact, circumstance and law involved therein the learned Tribunal has awarded compensation of Rs. 1,70,000/- + Rs. 2,000/- (as funeral expenses) i.e. Rs. 1,72,000/- (One Lakh Seventy two thousand only).

Another appeal bearing M.A. No. 298 of 2003 has also been preferred by the same appellant Ajay Kumar Khaitan @ Ajay Khaitan in Claim Case no. 16 of 1994 passed by the same Tribunal, whereby and whereunder the respondents/claimants Smt. Vidya Devi and others was ordered to be paid Rs. 1, 80,000 + 2,000 (as funeral

expenses) =. 1, 82,000/- (One lakh Eighty two thousand) only with interest at the rate of 9% per annum.

M.A. No. 299 of 2003 has also been preferred by the same appellant Ajay Kumar Khaitan @ Ajay Khaitan, in Claim Case No. 15 of 1994 filed by respondents/claimants Smt. Tara Devi and others. The appellant has been directed to pay Rs. 1, 70,000 + 2,000 (as funeral expenses) = Rs. 1, 72,000/- (One lakh Seventy two thousand) only as well as interest at the rate of 9% per annum.

All these three appeals are being taken up together for disposal by a common order. All these appeals are related to the Claim cases filed by three different sets of claimants on account of an accident by the offending vehicle Metador Van bearing registration No. BEA 6025. The aforesaid vehicle being rashly and negligently driven by the driver when reached near Amodiya Chock, East Champaran, dashed a motorcycle causing death of Uma Kant Thakur and others, and so three different sets of deceased have filed aforesaid claim cases and, accordingly, decided against the appellant being owner of the offending vehicle and thereby appellant to pay compensation to the claimants.

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Heard learned counsel for the appellants and learned counsel for the respondents. This will dispose of all the appeals.

On 01.12.1992 the said Metador Van bearing registration No. 6025, dashed a motorcycyle and three occupants of the said motorcycle namely Uma Kant Thakur, Om Prakash Thakur and Gopal Thakur died. While Uma Kant Thakur died on the spot, Om Prakash Thakur and Gopal Thakur subsequently died in course of treatment.

Ramgarhwa P.S. Case No. 41 of 1992 was registered for the said accident.

The case of the appellant as stated in the memorandum of appeal and submitted in short is that, initially the offending vehicle Metador Van bearing Engine No. 616969019949 and Chasis No. 616 FD 316408 having registration No. BEA-6025 was owned by M/s. Manav Distributor. The aforesaid vehicle was taken by Oriental Insurance Company Ltd.,(respondent no. 6) for the period from 26.02.1991 to 25.02.1992 under Cover Note No. 131363 dated 26.02.1991 concerned cover note is annexed herewith.

It has further been stated that the respondent Manav Distributor sold the said Metador Van BEA-6025 to the appellant Ajay Kumar Khaitan @ Ajay Khaitan on 25.11.1991, for which delivery note was prepared and signed by both the parties on 25.11.1991, Delivery Note dated 25.11.1991 is annexed herewith and marked Annexure-2 in the Memo of Appeal. But after purchase of said vehicle the appellant Ajay Kumar Khaitan @ Ajay Khaitan took fresh insurance policy of the said vehicle in the name of the original owner i.e. M/s. Manav Distributor because registration was not transferred at that time under Insurance Certificate No. PC – B/241 dated 26.12.1991 covering the period from 26.12.1991 to 25.12.1992 from the Oriental Insurance Company Ltd., Patna. Xerox copy of Insurance Certificate No. PC – B/241 of 1991 dated 26.12.1991 is annexed herewith and marked Annexure-3 to this memo of appeal of M.A. No. 299 of 2003.

Further contention of the appellant is that the said Metador

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Van was seized by police in Ramgarhawa P.S. Case No. 41 of 1992 and on production of papers including original Insurance Certificate No. PC - B/241 of 1991 dated 26.12.1991 of the vehicle in question, the same was released and original Insurance Certificate remained with police because by that time insurance had expired. But after 1-1/2 years of the accident three claim cases bearing No. 15 of 1994, 16 of 1994 and 17 of 1994 were filed on 24.06.1994 in the Tribunal at Motihari by the heirs and legal representatives of the deceased against previous owner of the vehicle namely M/s. Manav Distributor, the driver Kishore Singh and Divisional Manager, Oriental Insurance Company only. Appellant Ajay Kumar Khaitan was not made a party.

Claim Case No. 15 of 1994 was filed by the widow Tara Devi, three sons and one daughter of the deceased namely Uma Kant Thakur.

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Claim Case no. 16 of 1994 was filed by the widow Smt. Bidya Devi, daughter and one minor son of the deceased namely Om Prakash Thakur.

Claim Case No. 17 of 1994 was filed by the widow Smt. Kusum Devi and two sons of the deceased namely Gopal Thakur.

Further averment of the appellant is that, although, Oriental Insurance Company Ltd. appeared in Claim Case No. 15 of 1994 but never filed any written statement denying the policy of the vehicle which covered period of accident. The previous owner appeared and filed written statement stating that he had already sold the vehicle in question on 25.11.1991 to one Ajay Kumar Khaitan @ Ajay Khaitan

prior to the accident on 01.12.1992, therefore, he was not liable for any action and then name of previous owner was deleted from the case and on his place the appellant Ajay Kumar Khaitan @ Ajay Khaitan should be impleaded as party and as such an amendment petition was filed in the claim case. This appellant Ajay Kumar Khaitan @ Ajay Khaitan was impleaded as a party on 29.3.1996. But unfortunately notices on appellant were being issued on wrong address therefore, the appellant could not get notice to the claim case and ultimately on 30.3.1998 the service of notice to the appellant was accepted valid.

Claimant had also filed a petition on 27.08.1997 before the learned Tribunal for calling for police case diary and other papers of Ramgarhwa P.S. Case No. 41 of 1992 from the G.R. Office and the learned Tribunal on 24.09.1997 called for the case diary along with all the papers relating to vehicle in question and subsequently, concerned case diary along with all the papers of the vehicle in question including copy of Insurance after purchase bearing Insurance Certificate No. PC – B/241 dated 26.12.1991 covering the risk of the period from 26.12.1991 to 25.12.1992 were brought on the record of the claim case.

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Claimants obtained Xerox copy of Insurance Certificate No. PC – B/214 dated 26.12.1991 from the police and filed the same in the tribunal on 22.08.1998 in all the three claim cases by a common petition dated 22.08.1998. Thus the copy of the Insurance cover for the period from 26.12.1991 to 25.12.1992 was brought before the Tribunal for the first time on 22.08.1998 by the claimants. The learned Tribunal directed claimants to produce original paper of the said insurance

certificate.

The appellant for the first time appeared in the claim case and filed written statement on 13.12.2000 and accepted that vehicle in question was purchased from appellant M/s. Manav Distributor and also stated that he has purchased the vehicle and got insurance cover of the said vehicle from 26.12.1991 which was to expire on 25.12.1992 and so on the date of accident on 01.12.1992 the vehicle in question was insured under valid insurance cover.

The appellant also challenged maintainability of the claim case filed after lapse of about 2 years on the ground of limitation as provided under Section 173(3) of the Motor Vehicles Act, 1988 (hereinafter referred to as the Act) prevailing at the time of accident.

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Further averment made in this memo of appeal is that respondent Oriental Insurance Company Ltd did not file any written statement duly verified and affidavited, who only filed petitions without any affidavit to this effect that insurance cover from 26.12.1991 to 25.12.1992 was forged and fabricated one, typed copy of the petition filed by the Insurance company are annexed herewith marked Annexure-5/1, 5/2 and 5/3 respectively which are petitions dated 19.02.1996, 03.08.1996 and 26.09.1998.

It has also been submitted on behalf of the appellant that the respondent Oriental Insurance Company Ltd. virtually left to contest in the cases and which did not even cross-examine the witnesses nor produced any document in the form of Insurance Register, Premium Register of the relevant time so as to show that insurance certificate as

stated on behalf of the appellant was not issued from the Patna office of Oriental Insurance Co. Ltd.

On the other hand the appellant contested the case and asserted that the insurance cover as stated by him was a valid document and the vehicle was validly insured on the date of accident.

The learned Tribunal by passing the judgment dated 10.04.2003 in Claim Case No. 15 of 1994 filed for the death of Uma Kant Thakur and also by passing the judgment dated 10.04.2003 in Claim Case No. 16 of 1994 and on the same date i.e. 10.04.2003 by passing the judgment in Claim Case No. 17 of 1994 has allowed their petitions without considering facts in right perspective, as stated by the learned counsel for the appellant in course of hearing of the appeal, and for that the learned Tribunal has committed an error on record by holding that the appellant did not bring the concerned insurance policy on the record and so the finding of the learned Tribunal that policy for a period from 26.12.1991 to 25.12.1992 was not brought on the record is erroneous and against the facts of the case.

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It was also argued that onus was on the respondent-Oriental Insurance Company Ltd., to prove its genuineness for that the insurance company was supposed to have filed written statement duly verified and affidavited denying existence of such policy, and, thereafter insurance company could have proved their case by producing insurance records for the relevant periods such as Insurance Register, Premium Register, Premium Receipt, etc., but in the present case the Insurance Company neither filed any written statement nor the Insurance

Register, Premium Register, Premium Receipt, etc., for the relevant period to prove the fact that the Insurance Certificate No. PC – B/241 was not issued from the concerned branch of the vehicle in question.

So argument has been advanced on behalf of the appellant that the learned Tribunal committed an error of law by accepting denial of Insurance Company about non-existence of Insurance Certificate as stated above merely on the basis of unaffidavited petition which cannot be permitted in law.

It has further been argued that the Insurance company did not contest the claim case as company failed to cross-examine a single witness in the case nor brought any evidence from their side to prove that the Insurance Certificate in question was not genuine.

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In the facts and circumstances, the learned Tribunal has misconstrued and not considered the fact, evidence, circumstance in right perspective and without any valid basis on the record, he created doubt and decided the matter against the appellant. Admitted position is that the appellant purchased the vehicle in question from M/s. Manav Distributor and after purchase appellant took fresh Insurance Policy from the period from 26.12.1991 to 25.12.1992 in the name of previous owner because by that time ownership of the vehicle could not be changed in the record of the D.T.O. Therefore, the previous policy for the aforesaid period has no meaning in the present case.

Besides, the learned Tribunal has wrongly computed compensation by applying provisions of Second Schedule of amended Motor Vehicles Act, which is effective from 14.11.1994 whereas the

accident in the present case occurred on 01.12.1992 and therefore, the law available on the date of accident could have been made applicable in the present case.

It has also been submitted that prior to amendment in the M.V. Act, 1994 the maximum multiplier for the purpose of computing compensation was 16 only which was in respect of death of the victim in between age group of 23 to 28 but the deceased Uma Kant Thakur was 35 years old at the time of his death. So, the multiplier should not have exceeded 10 but it was computed on the multiplier of 17.

The Tribunal has also failed to appreciate the fact that the appellant was made a party at the end of the case, who appeared in year 2000, and, therefore, appellant was not liable for payment of any interest and that vehicle in question was validly insured at the material time of accident. Therefore, liability to pay compensation of the respondent- Oriental Insurance Company Ltd. is not on the shoulder of this appellant.

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So far present appellant is concerned, the only thing which is to be examined here as to whether the Metador Van in question was insured with the Oriental Insurance Company Ltd., Patna, and whether the driver had any valid driving license. Besides it is to be examined as to whether the multiplier applied in respect of accident taken place in the year 1992 is applicable after amendment coming into force of the M.V. Act, 2004.

The learned counsel for the appellant while assailing the judgment passed in the aforesaid claim petitions has submitted that there

is no denying fact that such claim cases were filed in the year 1994 after about 1-1/2 years of the accident and for the late filing of which, no explanation has been offered.

It has also been submitted that vehicle in question was seized after accident took place and was released in favour of M/s. Manav Distributor the previous owner of the vehicle, who did produce all relevant papers in the court including insurance cover and the court did examine all such documents and on being satisfied the vehicle was released.

It has further been submitted on behalf of the appellant that insurance cover which issued in the name of earlier owner of the vehicle, because of non-transfer of the ownership, for a period commencing from 26.12.1991 to 25.12.1992, was lying with the police diary and as such the applicants of the aforesaid claim petitions were in a position to refer such insurance cover even in the petitions filed on 24.06.1994 by referring Insurance Certificate No. PC – B/241 dated 26.12.1991 effective from 26.12.1991 to 25.12.1992.

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It has also been submitted that such reference of Insurance cover filed with the claim petitions even before appearance of the appellant not given to the claimants by the appellant are suggestive of the facts that such insurance cover was lying with the police record which enabled claimants to furnish details of insurance cover. Since, the original paper was not available with the appellant so after his appearance he was not in a position to furnish but he has referred Annexure-3 of this Memo of Appeal so as to show that there was valid

insurance cover in respect of the Metador Van for the period commencing from 26.12.1991 to 25.12.1992.

It has thus, been argued that such non-consideration of material point has ultimately led the learned Tribunal to fix responsibility and thereby to hold the appellant liable for paying compensation.

It has also been submitted that save and except an unaffidavited petition filed on behalf of the insurance company, nothing has been brought on the record so as to discredit or create doubt in the Xerox copy of the insurance paper in respect of insurance cover of the said vehicle for the aforesaid period.

It has also further been argued on behalf of the appellant that the accident took place on 01.12.1992 and the new amended Act, 1994 came after accident where multiplier system as provided in IInd Schedule of the Act was effective with effect from 14th November, 1994 by 54 of 1994 and in that context of the matter the multiplier applied for awarding compensation is not based on the prevalent law and so the learned Tribunal has not considered that aspect for computing compensation in right perspective.

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The learned counsel for the Insurance company has submitted that the insurance cover as claimed to have been issued in respect of the offending vehicle for the period of accident i.e. commencing from 26.12.1991 to 25.12.1992 was not a valid and genuine paper and as such the learned Tribunal in view of admission of the appellant being owner of the vehicle, has rightly fasten liability on

the shoulder of the appellant for paying compensation to the claimants.

All three cases as referred to above have been rightly decided by considering facts, evidence and taking into consideration of the multiplier system with respect to the age of the deceased and so no interference is required in the impugned judgment.

Having gone through the evidence on the record in the context of other materials, I find that Insurance company, the respondent has not adduced any evidence so as to dispel the defence of appellant Ajay Kumar Khaitan @ Ajay Khaitan, who himself has been examined as witness no. 1. He has stated that on the date of accident he was the owner of the vehicle, which had been insured by insurance cover for the aforesaid period, details of which has been given by the appellant. He has in cross-examination made on behalf of O.P. No. 1 Manav Distributor clarified that the papers furnished by Manav Distributor are genuine and report of the insurance company is wrong. In cross-examination made on behalf of the claimants he has also made it clear that papers which were brought, were recovered from his vehicle, were genuine papers. It also appears that nobody appeared for insurance company O.P. No. 3 for the purpose of cross-examination of this witness in spite of the case being called out and as such this witness was discharged.

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So, in that context of the matter, it can be deduced that evidence of this appellant has remained intact. Evidence of witness examined on behalf of claimant namely Ali Ahmad Ansari, in Claim Case No. 17 of 1994 remains intact as nobody appeared to cross-

examine the witness.

Claimant-witness no. 3 Kusum Devi who is said to have given details of the insurance cover has also not been cross-examined on behalf of the respondent insurance company.

From the aforesaid discussions of facts, evidence and materials and consideration thereof, I find that the plea of appellant in respect of existence of genuine and effective insurance cover of the offending vehicle for the period when such accident took place has not been considered by the learned Presiding Officer of the Tribunal in right perspective and so he has abruptly concluded by exonerating the insurance company from discharging its obligation and liabilities and thereby shifting the same on the shoulder of the appellant to meet such liability for paying compensation to the claimants of all the three claim cases.

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The order impugned is, thus, not sustainable on law as well as on facts, so, the same is required to be interfered with.

In the result, aforesaid orders and awards as stated above are hereby set aside and the record is being remitted to the court below for deciding the matter afresh after giving an opportunity of the appellant of being heard and to examine the insurance cover, whether original or Xerox, as the case may be and decide the matter in accordance with law.

The decision of the Tribunal in respect of multiplier is also not sustainable on facts and law and the same should also be decided by the Tribunal in accordance with law.

With the aforesaid observations, the appeal is allowed and disposed of.

Sanjeet **(Subash Chandra Jha, J.)**

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